No. 87-66 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

BRENDA BERKMAN, on behalf of herself and a class consisting of all similarly situated women,

Petitioner,

v.

THE CITY OF NEW YORK; EDWARD I. KOCH, individually and as Mayor of the City of New York; NEW YORK CITY FIRE DEPARTMENT; AUGUSTUS BEEKMAN, individually and as Fire Commissioner of the City of New York; NEW YORK CITY DEPARTMENT OF PERSONNEL; MICHAEL NADEL, individually and as Director of Personnel of the City of New York; THOMAS ROCHE, individually and as former Director of Personnel of the City of New York; CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK,

Respondents,

and

UNIFORMED FIREFIGHTERS ASSOCIATION and FIREFIGHTER ELIGIBLES ASSOCIATION, LIST NO. 1162, INC.

Intervenors-Respondents.

Brief in Opposition to Petition for Certiorari to the United States Court of Appeals for the Second Circuit

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STATUTES:

Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e-2 *et seq.* ..... *passim*

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REASONS WHY THE WRIT SHOULD BE DENIED.

I. This Court should not review the factual findings of the Court of Appeals.

This action was commenced in 1979 by petitioner, Brenda Berkman on her own behalf and as a representative of a class of women who passed the written portion of Examination 3040, the entry level test for New York City firefighters and thereafter took and failed or were allegedly deterred from taking the physical portion of that test. At trial, petitioner prevailed and Examination 3040 was found to be discriminatory and in violation of Title VII of the Civil Rights Act of 1964. *Berkman v. City of New York,* 536 F.Supp. 177 (E.D.N.Y. 1982), *aff'd,* 705 F.2d 584 (2d Cir. 1983).

Thereafter, pursuant to order of the District Court, 38 women were hired as firefighters after taking a special qualifying test agreed to by the parties. Pursuant to the District Court's mandate, a new physical test for firefighter was prepared by the City of New York (Examination 1162) with significant input from plaintiff, her experts and her attorneys.

> [I]n the case of Exam 1162, unlike Exam 3040, all parties to a greater or lesser extent participated in the test preparation and did so with substantial amount of job knowledge and sophistication about job testing acquired as a result of months of involvement in this litigation.

Berkman v. City of New York, 626 F.Supp. 591, 595 (E.D.N.Y. 1985).

The examination was administered only after a special training program was offered for women in order to prepare them for the test. Of the 165 women who took the physical examination, 77 passed. The pass rate for women who actively participated in the specially funded training program was very high with 40% scoring at least 85. The result of both the written and physical portions were averaged.

As a result of the complaint of the petitioner class that Examination 1162 was also discriminatory, extensive hearings were held with regard to the validity of the physical portion of the test. The District Court ruled that this portion of the examination was content valid and job-related in that it conformed to firefighters' tasks.

> [D]efendants have constructed and administered a physical examination that tests for the important physical capacities necessary to be a successful firefighter.

Berkman v. City of New York, 626 F.Supp. at 601.

The District Court, however, held that the method of scoring (seven 30-second bands) unduly emphasized speed (anaerobic energy) over stamina (aerobic energy) and thereby unfairly discriminated against females.

In response to submissions of the parties, the Court issued a three-pronged modification of the scoring system, affecting not only the physical portion but also intruding upon the scoring structure of the written examination which was never challenged as discriminatory. The modifications:

1) Established a three-band scoring system (system preferred by petitioner's experts)

2) Directed that the written test results be discarded in favor of a random assignment of computer generated written test scores to candidates who had passed both parts of the examination;

3) Required selection from an eligibility list by a 2.62 to 1 ratio in favor of women receiving particular score, to compensate for the alleged deterrent effect of discrimination.

The reviewing bench of the Second Circuit included two of three judges who had previously reviewed the case on appeal,[1] and thus was fully familiar with the history of the examination. The Court found that on the extensive testimony concerning Examination 1162, the District Court had correctly concluded that the test did not violate Title VII. The Second Circuit did not, as petitioner would have this Court believe, disregard the trial record in favor of stereotypes (Petition at 21, 32, 34). To the contrary, its decision was based upon the record below.

> Having reviewed the record and the decision of the District Court made on the basis of that record, we are not persuaded that the decision upholding validity was erroneous. The test was carefully constructed after a detailed consideration of firefighters' tasks. Substantial testimony before the District Judge supported validity on the basis of both content validation and criterion-related validation.

Berkman v. City of New York, 812 F.2d at 59.

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[1]Judge Kearse wrote the opinion in *Berkman v. City of New York,* 705 F.2d 584 (2d Cir. 1983), in which Judge Newman joined.

By continually taking the words "obviously" and "self-evident" out of the context within which they were delivered, petitioner seeks to create the impression that the findings reported by the Court of Appeals were the result of raw imagination rather than solid evidentiary support. This is clearly belied by the decision:

> Obviously, firefighters frequently face situations where their anaerobic abilities determine whether or not they will save the lives of fire victims. The firefighter arriving on the scene of a fire will frequently be obliged to use strength and speed in a short amount of time. *Abundant evidence in the record supports this point,* which in any event would be self-evident. (emphasis added).

Berkman v. City of New York, 812 F.2d at 52.[2]

Petitioner's challenge to the method of scoring utilized on the competitive civil service examination is nothing more than an assault on complex factual findings.

The instant matter has continued over a period of approximately eight years, generating thousands of pages of record. The Second Circuit has had the opportunity of twice reviewing the complicated history of the litigation. Given the initial determination that Exam 3040 was in violation of Title VII, one can be assured that the evidence concerning the new examination (1162) was given particular scrutiny by the Court of Appeals during the almost nine months between oral argument and issuance of its opinion.

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[2]The testimony of Homer Bishop, Chief of Operations of The Fire Department, illustrated the importance of speed under actual firefighting conditions, particularly where flashover (spontaneous ignition of an entire room) will occur, or where it is necessary to administer cardio-pulmonary resuscitation.

It would be imprudent for this Court to involve itself in a fact-finding process where

a) the highly unique factual history is not likely to be repeated;

b) the reliability of the Court of Appeal's evaluation is not suspect;

c) in essence, no issue of law has been presented, and

d) there has been dual validation of the actual testing procedures, both as to job-relatedness and predictability of job performance, hence absolutely no violation of Title VII.

Simply stated, the factual nature of the dispute here does not form the basis for this Court to exercise its extraordinary jurisdiction. "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925).

Furthermore, the case is devoid of material significance to parties other than those at bar. The petitioner does not pose any new propositions of law. She merely urges reanalysis of complicated facts and statistics, to which established principles have been applied with diligence.

The fair application of well-settled law to a unique fact pattern was accomplished by the Court of Appeals. There is no basis for further review.

II. The ruling of the Court of Appeals was correct and not in conflict with prior decisions.

The disparate impact of Examination 1162 on women resulted solely from a legitimate job-related procedure.

Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972). Regardless of gender distribution, the primary objective of firefighter appointment is to select those individuals who will predictably be the best firefighters in light of the nature of the job and high risk of danger to both victims and fellow workers. The standard for selection must therefore be high, not minimal. Examination 1162 indeed searched for those individuals with the best potential for the position.

Time and again it has been held that a perfect test is not required under Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Guardians Association of the N.Y.C. Police Dep't v. Civil Service Commission*, 484 F.Supp. 785 (S.D.N.Y. 1980), *aff'd in part vacated in part*, 630 F.2d 79, *cert. denied*, 452 U.S. 940 (1981). Here, Examination 1162 was found to be job-related both under content and criterion related studies.

Special affirmative assistance was offered to women by way of a training program to prepare them for the examination. Indeed, those who took advantage of the sessions fared well on the examination.

Simply stated, Examination 1162 did not discriminate against women. Rank order hiring was utilized because it was likely to result in better performance. Petitioner failed to provide an alternative procedure with a less adverse impact that would also have met defendant's legitimate hiring needs.

The Second Circuit thus correctly rejected the bizarre scoring systems adopted by the District Court. As indicated below, all were fatally flawed and served to destroy any attempt to hire on the basis of merit and fitness.

Three-band scoring.

Three band scoring minimized the achievement of the highest scores on exam where there was a wide range of scores rather than bunched results. The use of a three-band system would not eliminate the adverse impact on women, and would actually delay the appointment of the first woman. 812 F.2d at 57.

Discarding written scores in favor of computer generated distribution.

Minimal cognitive talent was tested on the written portion of the examination. There was absolutely no evidence that the written exam was discriminatory or resulted in a disparate impact upon women candidates, since there was a very high pass rate of both male and female applicants.

> [T]he content of the written test has not been shown to be vulnerable on any ground cognizable under Title VII.

812 F.2d 52.

The decision to distribute scores on the basis of luck was without regard to merit and fitness and potentially rewarded less qualified males and females.

Although many did well on the written portion of the exam, it still eliminated cognitively inferior candidates without a discriminatory impact on minority applicants. A more difficult written examination would, no doubt, have generated challenges from other groups. 812 F.2d at 60.

Imposition of a compensation ratio.

There is no evidence of deterrence in the record. Not one woman who took the written examination, but failed

to take the physical examination testified in this regard. 812 F.2d at 62. The District Court's inference of deterrence was pure conjecture.

Extraordinary affirmative action such as this is available only under limited circumstances. *Local 28, Sheet Metal Workers Int'l Ass'n v. E.E.O.C.*, ____ U.S. ____, 106 S.Ct. 3019, 92 L.E.2d 344 (1986) (e.g. where there is intentional discrimination or a long continued pattern of egregious conduct, none of which can be found here). The examination was the result of defendant's legitimate concern with constructing a selection process linked to the physical nature of the job. The absence of gender-related motivation is reflected in the elaborate cost-free training program offered to female candidates. 812 F.2d at 62.

Furthermore, female applicants were offered the opportunity to again take the physical test with an additional program of training "to enhance their chances of success." 812 F.2d at 62.

In sum, the petitioner failed to set forth any compelling basis for rejecting Exam 1162 as an inadequate testing mechanism for the position of firefighter.

It is emphasized that even with all scoring modifications directed by the District Court, the benefit to women applicants would be minimal. 812 F.2d 62.

As this Court explained in *Griggs, supra,* Title VII does not guarantee a job to every person regardless of qualification. The exclusion of women here has resulted solely from conditions of employment wholly related to job performance, and therefore, is not counter to any principle of law established by this Court.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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